Rule 26, Ariz. R. Crim. P.

Sentencing: Aggravation and Enhancement distinguished…….Revised 3/2010

The Arizona criminal statutes set a presumptive sentence for every offense. Any punishment above the presumptive sentence is an aggravated sentence; any punishment below the presumptive sentence is a mitigated sentence. "Our legislature established a presumptive sentence for each offense and allows a judge to increase the sentence to a stated maximum or to decrease it to a stated minimum based on aggravating or mitigating factors." *State v. Monaco*, 207 Ariz. 75, 78, ¶ 8, 83 P.3d 553, 556 (App. 2004).

The concepts of aggravating factors and sentencing enhancement factors are often confused. The Arizona Supreme Court has explained in a nutshell the difference between aggravating factors and enhancement factors in all cases other than death penalty cases[1]:

> Aggravating factors, unlike enhancement factors, do not increase the range of sentence to which a defendant is subject; they are used by the judge in determining the propriety of a sentence within the allotted range. They need not be proven by the state, and the court is not limited to formal "evidence" but may consider any reliable information made available to it.

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[1] Note, however, that in death penalty cases, the State must prove all aggravating circumstances to the jury beyond a reasonable doubt, because in those cases the penalty increases from life in prison to death if aggravating circumstances are found to outweigh any mitigating factors. "Under the new sentencing statutes, to obtain a death sentence, the state must prove the same aggravating circumstances required by the former statute and must prove them beyond a reasonable doubt. The only difference is that a jury, rather than a judge, decides whether the state has proved its case." S*tate v. Ring*, 204 Ariz. 534, 547, ¶ 24, 65 P.3d 915, 928 (2003).

State v. Fagnant, 176 Ariz. 218, 220, 860 P.2d 485, 497 (1993) [citations omitted]**,** *overruled on other grounds by State v. Smith*, 219 Ariz. 132, 194 P.3d 399 (2008). In other words, briefly stated, the difference is this: If the State alleges enhancement factors and proves them beyond a reasonable doubt, those enhancement factors increase the overall range of sentence that the defendant faces. Aggravating factors do not increase the overall range of sentence – they increase the defendant's sentence within the legislatively established range for that offense.

The Court of Appeals has also explained the nature of aggravating factors:

> To justify imposing a longer sentence than the presumptive under our carefully structured statutory scheme, a trial court must point to conduct that somehow exceeds the elements or aggravates the circumstances of the offense. The presumptive sentence is to be presumptively applied when the defendant's conduct satisfies but does not surpass the definition of the crime.

State v. Alvarez, 205 Ariz. 110, 115, ¶ 16, 67 P.3d 706, 711 (App. 2003) [citations and internal quotation marks omitted].

Enhancement factors

The Arizona statutes set out various sentencing enhancement factors, including those found in A.R.S. §§ 13-703, 13-704, 13 705, 13-706, and 13-708, as well as A.R.S. § 13-3410. The State must allege and prove sentencing enhancement factors beyond a reasonable doubt. If the State does so, the defendant faces an increased range of sentencing. These include such factual matters as the fact that the defendant has one or more prior felony convictions, the severity and number of those convictions, and whether any such convictions involved serious physical injury or the use or exhibition of a deadly weapon. Enhancing factors also include the fact that the defendant was on release from confinement when he committed the offense, the fact

that the offense was a "dangerous crime against children" or a "violent crime," and the fact that the defendant is a "serious drug offender."

Under the doctrine first stated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a defendant is entitled to have a jury determine the existence of certain enhancement factors. The jury must decide the issue if a finding that the factor exists *increases the possible maximum sentence* a defendant may receive for an offense. But the jury need not determine enhancement factors that merely increase the *minimum* sentence the sentencing court must impose within the sentencing range set for the offense. Thus, in *State v. Gross*, 201 Ariz. 41, 31 P.3d 815 (App. 2001), relying on *Apprendi*, the Court of Appeals held that the defendant was entitled to have the jury determine whether the defendant committed the offense while he was on release under A.R.S. § 13-604(R). If the State proves that allegation, the sentencing court must increase the term of imprisonment by two years. The Court stated, "The plain language in *Apprendi* requires that the defendant's release status be submitted to the jury and proved beyond a reasonable doubt." *Id.* at 44, ¶ 9, 31 P.3d at 818. Similarly, in *State v. Nichols*, 201 Ariz. 234, 236, ¶ 7, 33 P.3d 1172, 1174 (App. 2001), the Court held that a drug offense defendant was entitled to a jury trial beyond a reasonable doubt on the allegation of "serious drug offense/significant source of income" under A.R.S. § 13-3410(A). That statute provides that if the State proves that allegation, the person faces life imprisonment, far more than the drug offense itself carries. Thus, *Apprendi* requires the jury to determine the question.

However, the Arizona courts have rejected defendants' claims that *Apprendi* requires jury determinations of other enhancement factors. *See State v. Rodriguez*, 205

Ariz. 392, 399, ¶ 26, 71 P.3d 919, 926 (App. 2003) (no jury trial required for determination that juvenile defendant is a "chronic felony offender"); *Cherry v. Araneta*, 203 Ariz. 532, 534, ¶ 8, 57 P.3d 391, 393 (App. 2002) (judge rather than the jury could determine as a matter of law if the defendant's prior conviction was for a violent offense); *State v. Rodriguez*, 200 Ariz. 105, 107, ¶¶ 9-10, 32 P.3d 100, 102 (App. 2001) (no jury trial for determination whether the defendant had prior drug-related convictions for Proposition 200 purposes); *State v. Tschilar*, 200 Ariz. 427, 433, ¶ 19, 27 P.3d 331, 337 (App. 2001) (in kidnapping trial, no jury trial on issue whether victim was released unharmed; a conviction for kidnapping authorizes sentencing for class 2 felony, and finding of unharmed release reduces it to a class 4 felony); *State v. Flores*, 201 Ariz. 239, 241 ¶ 8, 33 P.3d 1177, 1179 (App. 2001) (no jury trial on A.R.S. § 13-604.02(A) allegation that defendant was on probation when he committed the offense because finding that allegation is true merely raises minimum term); *State v. Cox*, 201 Ariz. 464, 469, ¶ 18, 37 P.3d 437, 442 (App. 2002) (no jury trial on A.R.S. § 13-604.02(B) allegation).

Aggravating factors

A.R.S. § 13-702 states the complete range of sentences for certain offenders on their first felony conviction. Statutes set a presumptive sentence for every offense. "The presumptive sentence is to be presumptively applied when the defendant's conduct satisfies but does not surpass the definition of the crime." *State v. Alvarez*, 205 Ariz. 110, 115, ¶ 16, 67 P.3d 706, 711 (App. 2003)*, citing* §§ 13-701(C), 13-702(A). Any punishment above the presumptive sentence is an aggravated sentence.

In A.R.S. § 13-701(D), the legislature has set out a list of twenty-four "aggravating circumstances" that the sentencing court must consider in determining the sentence to be imposed within the statutory range. Six statutory mitigating circumstances that the court must consider are set forth in § 13-701(E). Both the aggravating and mitigating circumstance lists include a "catchall" provision that allows the judge to consider any other factor "relevant to the defendant's character or background or to the nature or circumstances of the crime." §§ 13-701(D)(24), (E)(6). Many of the statutory aggravating factors depend on the nature of the offense. Among other things, these factors include such things as that the offense involved serious physical injury or a deadly weapon (unless that circumstance is an element of the offense or has already been used for enhancement purposes). Other aggravating factors are whether an unborn child died during the commission of the offense; the value of the property taken or damaged; the presence of an accomplice; the especially heinous, cruel, or depraved manner of the offense; the fact that the offense was for pecuniary gain; the fact that the defendant procured the commission of the offense by paying someone else to do it; the harm done to the victim or the victim's survivors; the fact that the defendant ambushed the victim or lay in wait; and the fact that the crime was committed in the presence of a child. Some aggravating factors depend on the nature of the defendant, for example, that the defendant was a public servant or fiduciary and the offense related to the defendant's duties as such; the defendant had prior felony convictions; the defendant was wearing body armor; the defendant was impersonating an officer; or the defendant committed a "hate crime." Finally, some aggravating factors depend on the nature of the victim, for example, if the victim is over

sixty-five years old or disabled or if the defendant committed the offense in retaliation for the victim's reporting criminal activity.

The statutory mitigating factors include the defendant's age. Other such factors include the fact that the defendant's capacity to appreciate the wrongfulness of his conduct capacity to control himself was "significantly impaired," or he was under duress, or he was a relatively minor participant in the crime, although in each case the defendant's situation was not enough to serve as a defense.

"If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence." A.R.S. § 13-701(F). The jury must find aggravating circumstances, in both capital and noncapital cases, for the court to impose more than the presumptive sentence. *State v. Brown*, 209 Ariz. 200, 99 P.3d 15 (2004).

Arizona law recognizes that in exceptional circumstances, a sentence greater or lesser than the normal range may be appropriate. In A.R.S. § 13-702, the legislature provided that if a person is convicted of a felony without having previously been convicted of one and at least two mitigating factors apply, the court may impose a mitigated sentence. Conversely, if a person is convicted of a felony without having been previously convicted of one and at least two aggravating factors apply, the court may impose an exceptionally aggravated term.

A.R.S. § 13-701(C) requires the trier of fact to make a finding whether alleged aggravation or mitigation circumstances are true beyond a reasonable doubt, based on any evidence or information introduced or submitted to the court or trier of fact before sentencing or any evidence presented at trial. The sentencing court can consider "any

reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances." Rule 26.7, Ariz. R. Crim. P. The court may consider matters that would not be admissible at trial in making a sentencing decision, such as unsworn testimony and out-of-court statements. *State v. Johnson*, 131 Ariz. 299, 306, 640 P.2d 861, 867 (1982). The court may consider any relevant evidence to rebut the defendant's claims of mitigation, even though that evidence was not admissible at trial. *State v. Kiles*, 175 Ariz. 358, 368, 857 P.2d 1212, 1222 (1993); *State v. Ortiz*, 131 Ariz. 195, 208, 639 P.2d 1020, 1033 (1981), *overruled on other grounds by State v. Gretzler*, 135 Ariz. 42, 57 n.2, 659 P.2d 1, 16 n.2 (1983). For example, the court may consider illegally-seized evidence at sentencing. *State v. Benge*, 110 Ariz. 473, 480, 520 P.20 843, 850 (1974). The sentencing court may even consider information about a crime for which the defendant has been acquitted, so long as there is some evidence that the defendant committed the offense. *United States v. Watts*, 519 U.S. 148, 157 (1997) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); *State v. Curry*, 187 Ariz. 623, 632, 931 P.2d 1133, 1142 (App. 1996); *State v. Johnson*, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (App. 1995). "It is not an abuse of the judge's sentencing discretion to consider the original charges brought against a defendant when there is evidence that defendant committed crimes beyond the offense for which he faces sentence." *State v. Harvey*, 193 Ariz. 472, 476, ¶ 17, 974 P.2d 451, 455 (App. 1998). However, the trial court may not aggravate a defendant's sentence based on the mere report of an arrest; there must be some

evidence about the underlying facts to show that the defendant probably committed a crime of some sort. *State v. Shuler*, 162 Ariz. 19, 21, 780 P.2d 1067, 1069 (App. 1989).